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FEDERAL COMMUNICATIONS COMMISSION  
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Before the  
**Federal Communications Commission**  
Washington, D.C. 20554

In the matter of )  
 )  
Implementation of the Local )  
Competition Provisions in the )  
Telecommunication Act of 1996 )  
 )  
Interconnection between Local )  
Exchange Carriers and Commercial )  
Mobile Radio Service Providers )

DOCKET FILE COPY ORIGINAL

CC Docket No. 96-98

CC Docket No. 95-185

**COMMENTS OF THE SOUTHERN NEW ENGLAND TELEPHONE COMPANY  
ON PETITIONS FOR RECONSIDERATION OF FIRST REPORT AND ORDER**

The Southern New England Telephone Company (SNET) hereby responds to petitions filed by various parties seeking reconsideration of the FCC's First Order in this proceeding.

**BACKGROUND AND SUMMARY**

The First Order implements Sections 251 and 252 -- the local competition provisions -- of the Telecommunications Act of 1996.<sup>1/</sup> It does so by substantially reducing state public utility commission power to regulate the provision of in-state telecommunications by local exchange carriers (LECs).

In view of the FCC's approach, several parties, including SNET, have filed petitions for court review. Those petitions challenge the FCC's authority to adopt pricing rules and some of the First Order's non-pricing rules as well. The petitions have been consolidated in the U.S. Court of Appeals for the Eighth Circuit, and that Court has set a schedule for briefing and oral

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<sup>1/</sup> Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, FCC 96-325 (rel. Aug. 8, 1996).

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624

argument which is designed to permit a final decision on the merits of the consolidated appeals by early next year.<sup>2/</sup>

In fact, the Eighth Circuit Court already has tentatively concluded that some key elements of the FCC's plan are unlawful. It did so in granting a stay of both the FCC's pricing rules and the "pick and choose" rules pending its final decision on all issues in the consolidated cases.<sup>3/</sup> In staying enforcement of those aspects of the FCC's First Order, the Court stated that it has "serious doubts" that the FCC has authority to issue rules of any type on those subjects.<sup>4/</sup>

Against this backdrop of litigation, 45 parties have petitioned the FCC for reconsideration and clarification of various aspects of the First Order. Proposals in the petitions which request modifications to FCC rules that are being challenged in the Eighth Circuit litigation should be put on the back burner as a matter of administrative efficiency. If the Commission nonetheless chooses to consider proposals to reconsider these rules, it should (1) revoke all pricing rules governing in-state service since the Eighth Circuit has concluded that the agency more likely than not lacks jurisdiction over those matters, and (2) as to proposals suggesting modifications to non-pricing rules should flatly reject some as plainly unlawful and adopt others because they seek to correct obvious deficiencies.

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<sup>2/</sup> Iowa Util. Bd. v. FCC, Order (filed Oct. 10, 1996) (requiring opening briefs of petitioners by Nov. 12, 1996; opening briefs of respondents by Dec. 16, 1996; reply briefs of all parties by Dec. 31, 1996; and oral argument during the week of Jan. 13, 1997).

<sup>3/</sup> Id., Order granting Stay Pending Judicial Review (filed Oct. 15, 1996) ("slip op."); apps. to vacate pending (S. Ct. Nos. A-299-300, filed Oct. 24, 1996).

<sup>4/</sup> Slip op. at section II.A.

## ARGUMENT

### **I. In Order to Promote Administrative Efficiency, The FCC Should Refuse to Entertain Requests to Modify its Pricing Rules and All Other Rules that Are Under Challenge In the Eighth Circuit Litigation**

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While several petitioners have requested reconsideration of numerous aspects of the FCC's rules, for sake of administrative efficiency the Commission should decline to address petitions to reconsider any rule that is being challenged in the Eighth Circuit litigation. That Court has already postponed enforcement of all of the pricing rules pending the outcome of the litigation after finding it more likely than not that the 1996 Act gives the FCC no jurisdiction to adopt rules of any type which determine how in-state telecommunications is priced. Petitioners will argue in that litigation that the FCC exceeded its jurisdiction in adopting some non-pricing rules as well. On November 12, the Commission will be able to determine which of its non-pricing rules are the subject of this litigation since opening briefs of petitioners must be filed on that date.

Even if the Eighth Circuit litigation were not in progress, it still would be administratively inefficient for the Commission to consider revising the proxy prices established by the First Order as some petitioners have proposed.<sup>5/</sup> This is so since the Commission has stated that it intends shortly to initiate a new proceeding to examine the question of whether the methodology it used to set proxy prices in the First Order should be replaced with an entirely differ-

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<sup>5/</sup> See, e.g., AT&T Pet. at 19-20 (request to establish a new proxy rate ceiling for non-recurring activities); MCI Pet. at 12-15 (request for reconsideration of proxy rates), *id.* at 35-37 (request for reconsideration of proxy rates for collocation and transport); Sprint Pet. at 7-9 (request for reconsideration of provisions requiring geographic deaveraging of proxy rates).

ent methodology.<sup>6/</sup> It would waste administrative resources for the Commission to revise proxy prices in this proceeding when those prices may be revised again only a few weeks or months later due to adoption of an entirely new methodology for calculating them.

While administrative efficiency calls for the FCC to place on the back burner all proposals for revising the First Order rules that are being challenged in the Eighth Circuit, the Commission may nonetheless choose to consider some of those proposals. If it reconsiders its pricing rules, it should do so by revoking them on the ground that it lacks jurisdiction over in-state pricing for the reasons set forth in the Eighth Circuit's stay order. If it chooses to reconsider any non-pricing rules under review in the Eighth Circuit litigation, it should reject some and implement others as set forth in Sections II, III, and IV below.

## **II. Certain Holdings Concerning the Scope of Services Covered by the Resale Requirement Are Plainly Erroneous and Should Be Revised While Others Are Correct and Should Not Be Changed**

### **A. The FCC Should Not Require Incumbent LECs to Provide Market Trials and Customer-Specific Contract Offerings to Resellers Under Section 251(c)(4)**

SNET supports the LEC Coalition's request that market trials and customer-specific contract offerings be excluded from the requirement in Section 251(c)(4) that incumbent LECs "offer for resale . . . any telecommunications service that the carrier provides at retail" to non-carrier customers.<sup>7/</sup> First, by its terms that provision covers only services which LECs offer "at retail". Market trials and customer-specific contract offerings typically are not provided at retail. Market trials involve new services that have yet to be offered to the public; contract

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<sup>6/</sup> See First Order at ¶¶ 623, 835.

<sup>7/</sup> 47 U.S.C. §251(c)(4); LEC Coalition Pet. at 2-3.

offerings typically are one-of-a-kind services prepared for a specific customer, rather than services that are subscribed to by numerous customers.

However, even if market trials and contract offerings could be deemed to be sold "at retail", the FCC's own logic for exempting 90-day promotions from Section 251(c)(4) requires that it exempt market trials and contract offerings too. Specifically, the FCC exempted 90-day promotional offerings from Section 251(c)(4) because Section 252(d)(3) does not require services offered at retail to be provided under Section 251(c)(4) unless they are also offered at "retail rates", and the Commission found that short term promotional offerings, by definition, are not offered at retail rates.<sup>8/</sup> Similarly, market trials are not offered at retail rates since one of the purposes of a market trial is to gather data prior to full commercial deployment to facilitate setting the retail rate once the service is offered commercially. Contract services, on the other hand, are offered at wholesale rates, not retail rates, since the price of a contract offering includes no reasonably avoidable costs.<sup>9/</sup> A contract offering includes no advertising or marketing costs, and hence no mark-up attributable to these costs; nor does it include significant costs of billing, collection, product management or customer service.

The Commission also should permit LECs to restrict the resale of market trials and contract offerings since doing so is clearly reasonable within the meaning of Section 251(c)(4)(B). That statute makes clear that a LEC may make reasonable restrictions on the resale of services since it prohibits only "unreasonable" restrictions.<sup>10/</sup> Prohibiting resale of mar-

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<sup>8/</sup> First Order at ¶ 949.

<sup>9/</sup> See First Order at ¶¶ 912-20; LEC Coalition Pet. at 3.

<sup>10/</sup> 47 U.S.C. § 251(c)(4)(B).

ket trials and contract services is a reasonable restriction because it has the desirable effect of enhancing innovation by giving LECs an incentive to introduce new services that otherwise would be totally absent given that LEC competitors then could claim an immediate entitlement to resell those services to their own customers.

Permitting LECs to restrict the resale of market trials also is reasonable under Section 251(c)(4)(B) since market trials often are designed to test unproven technology. If a LEC is required to permit resellers to resell the LEC's market trials, it would limit the LEC's ability to properly test new technology, thereby limiting its ability to offer new products and services. For example, SNET conducted a limited trial of voice activated dialing with a small group of customers. During that trial, it discovered several technical difficulties which limited the use and effectiveness of that service. As a result, SNET determined that the technology available at the time was not yet ready for wide-scale deployment.

SNET also believes the FCC's decision to bar LECs from restricting cross-class selling of any service was unlawful since the Commission offered no rationale for its decision to do so. In fact, Section 251(c)(4)(B) contemplates permitting any restriction on cross-class selling as long as it is not "unreasonable or discriminatory." Moreover, the Commission's decision to permit restrictions on the sale of residential service to business customers exposes the unlawful nature of the decision to bar restrictions on cross-class selling of other services. There, the Commission found that prohibiting the sale of residential service to business customers is reasonable because it would bar a reseller from offering residential service to those ineligible

to receive it.<sup>11/</sup> Permitting LECs to restrict the sale of other services between customer classes is reasonable for exactly the same reason.

The fact that there are sound reasons for a LEC to restrict eligibility to subscribe to a service also provides a sound reason to permit LECs to prohibit cross-class selling by resellers. For example, the price specified in a LEC retail tariff may be based on the assumption that the length of the subscriber loop of those who subscribe to that particular service may be less than a specified distance. Alternatively, a particular service may not be designed for billing multiple users.

**B. The Exclusion of Short-Term Promotions from a LEC's Resale Obligation Should Be Preserved Notwithstanding the Request of AT&T and MCI to Eliminate It**

AT&T and MCI request that the Commission reverse its decision to exempt a LEC's short-term promotional offerings from the Section 251(c)(4) resale obligation, but the FCC should reject that request.<sup>12/</sup> As explained above, the Commission properly found that short term promotions are not covered by Section 251(c)(4) since Section 251(d)(3) makes clear that promotional rates are not retail rates.

Moreover, the arguments AT&T and MCI make to justify their request are insufficient. AT&T asserts that LECs will use promotions to obtain a competitive advantage unavailable to resellers.<sup>13/</sup> This is absurd. Resellers can offer promotional discounts at will. MCI contends that LECs will "string together" promotional rates in an effort to avoid the wholesale pricing

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<sup>11/</sup> First Order at ¶ 962.

<sup>12/</sup> AT&T Pet. at 29-31; MCI Pet. at 8-12.

<sup>13/</sup> AT&T Pet. at 31.

requirement.<sup>14/</sup> This is a purely hypothetical argument that can be addressed in a proper factual setting.

### **III. The Commission's Interpretation of the Obligation to Provide Unbundled Network Elements Also Is Wrong In Some Respects and Correct In Others**

SNET supports the LEC Coalition's proposals to make the First Order's network unbundling requirements more reasonable, but before we explain why the Commission should implement those proposals we want to make two preliminary points. Number one: Although the Eighth Circuit will decide whether the FCC's unbundling requirements are lawful, the test set forth in the First Order for determining the technical feasibility of a specific unbundling proposal is plainly arbitrary and capricious in two respects. In the first place, the FCC's test irrationally holds that regulators will irrebuttably presume that it is "technically feasible" for a LEC to comply with any unbundling request unless the LEC proves otherwise even though the feasibility of accommodating a particular unbundling request may depend on the specific technology which the competitor wants to use or on other facts largely outside the LEC's control.<sup>15/</sup> To make matters much worse, the FCC's test makes it impossible as a practical matter for a LEC ever to demonstrate technical infeasibility by holding that proof that the request would be exorbitantly expensive to accommodate due to severe technological problems is irrelevant to the issue of whether accommodating a particular request is technically feasible.<sup>16/</sup> Since almost every technical problem theoretically could be solved if enough time and money is spent working on it, the unlawful implication of the holding about the irrelevance of economic cost is that any request

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<sup>14/</sup> MCI Pet. at 9-10.

<sup>15/</sup> First Order at ¶¶ 198, 205, 281.

<sup>16/</sup> Id. at ¶¶ 199, 281.

by a competitor for additional network unbundling will be deemed technically feasible unless the LEC proves that a law of nature makes it literally impossible to accommodate the request.

Number two: Not only does the First Order unlawfully require a LEC to unbundle its network in ways that are technically impractical, it also improperly gives competitors a right to insist that a LEC provide them with higher quality network elements than those which the LEC itself uses to provide service.<sup>17/</sup> This decision is similarly improper because there is no statutory basis for the Commission to require that a LEC provide higher quality facilities to its competitors than the company uses itself.

**A. The Commission Should Revise Its Interpretation of the Scope of a LEC's Obligation to Provide Unbundled Network Elements In Ways Which the LEC Coalition Has Proposed**

Notwithstanding the First Order's arbitrary and capricious test for determining the technical feasibility of a particular unbundling proposal and its similarly improper requirement that a LEC provide higher quality facilities to competitors than it uses itself, there are sound reasons to revise the First Order's unbundling requirements as the LEC Coalition proposes in ways which have nothing to do with technical feasibility. We discuss several of the LEC Coalition's proposals in the paragraphs which follow.

First, SNET supports the proposal that the FCC modify the standard set forth in the First Order for considering whether the benefit of honoring an unbundling proposal requiring access to proprietary technology outweighs the risk. On its face, Section 251(d)(2) of the 1996 Act requires that a LEC provide competitors with a specific network component that involves use

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<sup>17/</sup> First Order at ¶¶ 314, 382.

of proprietary technology only if the benefit outweighs the risk.<sup>18/</sup> Unfortunately, the First Order implicitly holds that the benefit of increased competition which may result from a competitor's use of the LEC's proprietary technology always outweighs the risk. It does this by holding that a LEC may escape the duty to provide a network element based on the fact that the element contains proprietary technology only if the LEC provides a comparable element that does not contain proprietary technology.<sup>19/</sup> But the Commission's claim that the benefit of forcing a LEC to let others use proprietary technology always exceeds the risk is inconsistent with the First Order's acknowledgement that (1) competitive benefit will occur only in "some instances" rather than in all (or even most) instances,<sup>20/</sup> and that (2) mandating access to proprietary LEC technology produces a serious risk of "reduc[ing a] LEC['s] incentives to offer innovative services."<sup>21/</sup> Moreover, the Commission failed either to consider the risk of legal liability that could result if a LEC permits competitors to use proprietary technology without the owner's consent or to explain why an occasional benefit to competition outweighs that risk.<sup>22/</sup> It also failed to explain why it believes that the competitive benefit outweighs risk in a situation where

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<sup>18/</sup> 47 U.S.C. §251(d)(2).

<sup>19/</sup> Id. at ¶ 283.

<sup>20/</sup> Id. at ¶ 282.

<sup>21/</sup> Id.

<sup>22/</sup> LEC Coalition Pet. at 26-27. See also First Order at ¶¶ 388, 419 (acknowledging that several parties had pointed out that agreements between a LEC and its equipment or software supplier often make it unlawful for the LEC to permit others to use the suppliers' proprietary technology but then refusing to consider this fact merely because more parties had not called this problem to the agency's attention).

the competitor could provide the service at issue on comparable terms without using the LEC's network.

SNET also supports the LEC Coalition's request that the FCC reverse its decision to require that a LEC offer its directory assistance service and other operator services as an unbundled network element.<sup>23/</sup> Although Section 251(c)(3) of the 1996 Act requires LECs to provide "network elements" on an unbundled basis, Section 3(a) makes clear that a network element is "a facility or equipment used in the provision of telecommunications service" (including its "features, functions and capabilities") but that telecommunications service itself is not a network element.<sup>24/</sup> As the LEC Coalition demonstrates, operator services are telecommunications services, not network elements as defined in the 1996 Act.

Nor do operator services constitute "features, functions, and capabilities" provided by means of the unbundled switching element as the FCC implies in its First Order.<sup>25/</sup> It is true that LEC switches are used in providing directory assistance and other operator services, but the provision of these services requires that LECs incur substantial non-switching expenses as well.

SNET also supports the LEC Coalition's position on postponement of the First Order's January 1, 1997 deadline for development and full implementation of computerized interfaces

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<sup>23/</sup> LEC Coalition Pet. at 27-29.

<sup>24/</sup> The definition of "network element" in the 1996 Act was codified in Sec. 3 of the Communications Act of 1934 at 47 U.S.C. § 153(29). The FCC recognized in the First Order that the 1996 Act's definition of "network element" "draws a distinction between a 'facility or equipment used in the provision of a telecommunications service,'" and the "'service' itself." First Order at ¶ 251.

<sup>25/</sup> *Id.* at ¶ 412.

for transacting inter-carrier transactions.<sup>26/</sup> While the Commission's jurisdiction under Section 251(c)(3) to require that LECs provide these interfaces is subject to dispute, SNET and other LECs are nonetheless working hard to develop standards for such interfaces as the First Order itself recognizes,<sup>27/</sup> and SNET will deploy them as soon as reasonably possible. However, the January 1, 1997 implementation deadline cannot be met because development and implementation of these standards is a major undertaking.

SNET also supports the LEC Coalition's request that a LEC be permitted to require volume or term commitments from competitors who subscribe to network elements. In the absence of such a requirement, the LEC could be forced to absorb costs to make the element available if demand for the element is lower than expected. Requiring a volume or time commitment also furthers competition by discouraging frivolous requests for interconnection.

If the FCC chooses to reconsider its rules on unbundled access, it should clarify that a LEC need not provide a competitor with access to the SMS/800 database as part of the First Order's requirement that a LEC provide unbundled access to all call-related databases, including "SMS(s) used to input data to the LIDB, Toll Free Calling, Number Portability and AIN call-related databases."<sup>28/</sup> The agency should provide this clarification because the SMS/800 database is not a network element as defined in the 1996 Act. A facility used by a LEC to provide telecommunications service is a network element for purposes of the 1996 Act only if

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<sup>26/</sup> LEC Coalition Pet. at 4-5.

<sup>27/</sup> First Order at ¶ 513.

<sup>28/</sup> *Id.* at ¶ 499. See LEC Coalition Pet. at 32-33.

the facility is under the exclusive control of that LEC. No LEC can be required to provide the SMS/800 database as a network element because that database is not under the exclusive control of any particular LEC. Instead, it is a nationwide database to which all LECs and all other telecommunications carriers -- including all CLECs -- already have access on nondiscriminatory terms pursuant to tariff.<sup>29/</sup>

**B. Other Proposed Revisions to the Unbundling Obligation Should Be Rejected**

While the FCC may choose to modify its unbundling requirements in ways that the LEC Coalition has proposed, it should reject the modification proposals of those petitioners who ask the agency to mandate that LECs provide additional network elements because advocates of those proposals fail to justify them in accordance with the 1996 Act and the First Order. In considering whether to mandate that LECs provide competitors with a discrete network component as an unbundled network element, Section 251(d)(2) requires that the FCC "consider . . . whether . . . [denying] access to . . . [that] element[] . . . would impair the [competitor's] ability . . . to provide the services that it seeks to offer." The First Order holds that a competitor's service would be "impaired" only if "the quality of the service . . . [would] decline[] . . . or [if] the cost . . . [would] rise[]."<sup>30/</sup> While several petitioners ask the Commission to require that LECs unbundle their networks in ways not already mandated by the First Order, they offer no evidence that failure to do so would cause any identifiable service to decline in quality or increase in cost. Specifically, they propose that the Commission force LECs to offer each of several discrete sub-

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<sup>29/</sup> First Order at ¶ 469.

<sup>30/</sup> Id. at ¶ 285.

loop components as separate unbundled network elements, but they do not define the service whose cost or quality would be hurt by a LEC's failure to make these offerings, and they do not explain why the cost or quality of that undefined service would be hurt.<sup>31/</sup> Nor does MCI either describe the service it would offer if it had access to dark fiber as a network element as it proposes or explain why the cost or quality of that undefined service would be hurt in the absence of access to dark fiber as a network element.<sup>32/</sup>

MCI's request that the Commission order LECs to provide dark fiber as an unbundled network element should be rejected for another reason too. While Section 251(c)(3) of the 1996 Act requires LECs to provide network elements on an unbundled basis, Section 3(a) defines network element as a facility or equipment used to provide service but not the service itself as explained above.<sup>33/</sup> The FCC already has held -- ironically at MCI's urging -- that a dark fiber offering is a common carrier telecommunications service, not a telecommunications facility or equipment.<sup>34/</sup>

There also is a second reason for rejecting the proposal to require subloop unbundling. Specifically, the Commission held in the First Order that, although state regulators were free to consider subloop unbundling requests, the FCC itself would not require subloop unbundling

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<sup>31/</sup> See MCI Pet. at 16-20; MFS Pet. at 9-11.

<sup>32/</sup> MCI's failure to show why its ability to offer a defined service is impaired in the absence of access to dark fiber as an unbundled network element is particularly relevant given the fact that several LECs already provide dark fiber under tariff as MCI itself admits. MCI Pet. at 22.

<sup>33/</sup> See supra p. 11.

<sup>34/</sup> Southwestern Bell Tel. Co., 8 FCC Rcd. 2589, 2594 (1993) ("we conclude ... that the BOCs' provision of dark fiber service is a common carrier service within the meaning of the Act").

unless there was a "demonstrable" showing that network reliability could be preserved if access to unbundled subloop elements were provided.<sup>35/</sup> None of the petitioners who advocate sub-loop unbundling attempts to make this showing, offering instead only highly generalized assertions that network reliability would not be compromised.<sup>36/</sup>

#### **IV. Paging Companies Should Not Be Subject to the Reciprocal Compensation Rule**

SNET supports the proposal by the LEC Coalition and Kalida Telephone Co. that the Commission correct its erroneous holding that the requirement in Section 251(b)(5) of the 1996 Act to provide reciprocal compensation mandates that a LEC compensate those who provide one-way paging service each time a customer of the LEC pages a customer of the paging company.<sup>37/</sup> While Section 251(b)(5) mandates reciprocal compensation in certain circumstances, Section 252(d)(2) makes plain that a carrier must provide such compensation to an interconnecting carrier for terminating a call originated on the first carrier's network only if the origination and termination of traffic by customers of the two carriers is "mutual and reciprocal". The origination and termination of traffic between networks of a LEC and an interconnecting paging company is not "mutual and reciprocal" since the paging company's customers do not originate calls. Instead, all traffic between any interconnecting LEC and paging company originates on the LEC's network.

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<sup>35/</sup> First Order at ¶ 391.

<sup>36/</sup> MCI Pet. at 16; MFS Pet. at 10.

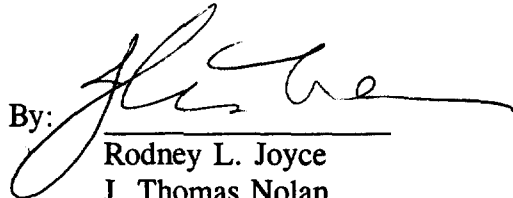
<sup>37/</sup> LEC Coalition Pet. at 17-18. See generally Kalida Tel. Co. Pet.

## CONCLUSION

Administrative efficiency dictates that the FCC defer acting on any proposal to modify any rule that is the subject of the Eighth Circuit litigation now well underway. However, if the Commission chooses to reconsider a particular rule -- either because it is not the subject of the ongoing litigation or because the agency wants to do so notwithstanding the fact that it is administratively inefficient to do so -- it should adopt certain modifications and reject others as described above.

Respectfully submitted,

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October 31, 1996

## **CERTIFICATE OF SERVICE**

I *HEREBY CERTIFY* that on this 31st day of October, 1996, a copy of the foregoing Comments of the Southern New England Telephone Company on Petitions for Reconsideration of First Report and Order have been delivered, via U.S. mail, to:

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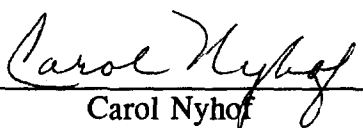
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